

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 28, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2597

Cir. Ct. No. 2009CV4938

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ASSOCIATED BANK N.A.,

PLAINTIFF,

SB1 WAUKESHA COUNTY, LLC,

CO-PLAINTIFF-RESPONDENT,

v.

**JACK W. COLLIER, DEBORAH L. COLLIER, GREENBRIER DEVELOPERS,
LLC, EXECUTIVE REALTY PARTNERSHIP LP, GERALD FRANKLIN,
KENNETH WHALEY, ISB COMMUNITY BANK AND UNITED STATES OF
AMERICA,**

DEFENDANTS,

DECADE PROPERTIES, INC.,

INTERVENING DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County:
DONALD J. HASSIN, JR., Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. This case began as a foreclosure action affecting property in Waukesha county. Decade Properties, Inc., appeals from the order denying its motion for summary judgment and granting the Motion for Turnover of SB1 Waukesha County, LLC, and from the order denying its motion for reconsideration. Decade asserts that the trial court erroneously concluded that, to obtain a creditor’s lien in a supplemental proceeding under WIS. STAT. § 816.03(1)(b), a judgment must be “executable,” which contemplates that the judgment is perfected under WIS. STAT. § 806.06(4) and entered in the judgment and lien docket under WIS. STAT. § 806.10 (2009-10).¹ Decade also contends the court erred in declining to give its lien priority on equitable grounds. We disagree and affirm.²

¶2 In December 2009, Associated Bank, N.A., filed a foreclosure action seeking a deficiency judgment against Jack W. Collier. Associated won a nearly \$11 million default judgment against Collier. The judgment was entered in the

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

² Decade moved to supplement the record with post-appeal documents and to have this court take judicial notice of them. The motion contended that SB1 inserted matters outside the record in its respondent's brief and the new materials would more accurately portray the status and nature of the collection and certain fraud allegations. This court held the motion in abeyance until the panel took the case under submission. We now deny the motion. Decade’s proffered material was unnecessary to deciding the case because the documents deal with the collection battle, not which lien has priority.

judgment and lien docket on May 28, 2010. SB1 purchased approximately \$8.6 million of Associated's judgment and joined this action as co-plaintiff.

¶3 In September 2010, SB1 initiated supplementary proceedings under WIS. STAT. ch. 816 in an effort to collect its judgment. Orders to appear were entered against Collier and Jeffrey Keierleber, Decade's owner and a frequent business partner of Collier's. Personal service was made on Keierleber but Collier was not served for some time, whether through SB1's delay, as Decade contends, or Collier's evasion, as SB1 asserts.

¶4 In short order, Keierleber commenced six lawsuits on behalf of Keierleber, Keierleber-owned, and Keierleber- and Collier-owned Wisconsin and Florida entities, Decade among them. Each complaint sought enforcement of a claimed loan right and money judgment against Collier or against two business entities of which Keierleber and Collier each owned a fifty-percent interest. While still unserved with SB1's order to appear, Collier accepted service of these six complaints. The parties involved in the six new actions executed stipulations agreeing to judgment amounts in each of them.

¶5 Of the six new judgments, the one relevant here is Decade's judgment against Collier in the amount of \$654,646.83, filed in the clerk's office on October 22, 2010. Decade initiated supplemental proceedings against Collier. Collier accepted service of the Order to Appear on November 16, 2010, and appeared at the November 22, 2010 supplemental examination.

¶6 On April 2, 2011, SB1 served Collier with an order to appear and a motion for appointment of receiver. Collier failed to appear as ordered. On April 18, the court commissioner entered an Order for Appointment of Receiver

and an Order to Show Cause requiring Collier to show why he should not be held in contempt. On June 10, the circuit court found Collier in contempt.

¶7 Decade moved to intervene in the action involving SB1 in an effort to assert its lien priority. On June 29, Decade discovered that its October 22, 2010 judgment against Collier was undocketed. Although Decade had tendered the docketing fee when it filed the judgment and received a receipt and a conformed copy of the judgment, the clerk inadvertently had not entered the judgment in the judgment and lien docket. *See* WIS. STAT. § 806.10(1). The clerk docketed the judgment on June 29. SB1 filed a Motion for Turnover of all Collier's rights, title and interest in various assets and associated with the six stipulations and judgments.

¶8 Decade moved for summary judgment seeking a determination that its lien had priority over SB1's. The circuit court held that Decade's lien was subordinate because its judgment had not been perfected, *see* WIS. STAT. § 806.06(1)(c), (4), and therefore was not "executable," when it served Collier with the Order to Appear. The court also held that Decade could not have obtained a creditor's lien at that time because its judgment had not been properly entered in the judgment and lien docket. *See* WIS. STAT. § 806.10(1).

¶9 The court denied Decade's motion and ordered that all SB1's liens were superior to Decade's and that any actions, proceedings, liens or orders relative to Decade's undocketed judgment before June 29, 2011, that might affect SB1's supplemental proceedings or attempt to execute on the judgment were "held for naught." Further, the court granted SB1's Motion for Turnover, ordering that all rights, title and interest vested in Collier to unasserted counterclaims or affirmative defenses on his behalf, including those relative to his interests in the

six new cases, including all potential claims against third parties, were now vested in, with exclusive possession and control granted to, the receiver.³ The court subsequently denied Decade's motion for reconsideration.

¶10 On appeal, Decade claims that its lien is entitled to priority because it served Collier with an Order to Appear before SB1 did. It contends that nothing in WIS. STAT. § 816.03(1)(b) requires a judgment creditor to comply with the judgment-perfection statute or have a properly docketed judgment. We disagree.

¶11 Our analysis requires that we construe several related statutes. Interpretation of a statute is a question of law that we determine independently of the circuit court but benefiting from its analysis. *See South Milwaukee Sav. Bank v. Barrett*, 2000 WI 48, ¶26, 234 Wis. 2d 733, 611 N.W.2d 448. We interpret statutory language in the context in which it is used and in relation to the surrounding and closely related statutes. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. We favor a construction that fulfills the statute's purpose over one that defeats it. *County of Dane v. LIRC*, 2009 WI 9, ¶34, 315 Wis. 2d 293, 759 N.W.2d 571.

¶12 For a judgment to be capable of creating a lien, it must be rendered, perfected and entered. A judgment is rendered when it is signed by the judge. *See* WIS. STAT. § 806.06(1)(a). It is perfected when the costs are taxed and the amount inserted in the judgment, either before or after it is entered. Sec. 806.06(1)(c), (4). Entering a judgment involves two steps. The party must file the judgment in the clerk's office, § 806.06(1)(b), at which time the clerk must enter, or docket, the

³ The grant of the Motion for Turnover is not challenged on appeal.

judgment in the judgment and lien docket, WIS. STAT. § 806.10(1). The Decade/Collier judgment was signed by the judge and filed in the clerk's office with the proper fee on October 22, 2010, with the amount of costs inserted. *See* § 806.06(1)(a)-(c). Entry was not complete, however, until the clerk docketed the judgment on June 29, 2011.

¶13 An undocketed judgment cannot be executed. *See* WIS. STAT. § 806.06(4) (“[n]o execution shall issue until the judgment is perfected or until the expiration of the time for perfection”)⁴; *see also* WIS. STAT. § 815.04(1)(a) (providing that execution may issue within five years of the rendition of “any judgment of a court of record perfected as specified in s. 806.06 or any judgment of any other court *entered in the judgment and lien docket* of a court of record”) (emphasis added).

¶14 Moreover, “[a] judgment must be properly docketed to become a lien.” *Builder’s Lumber Co. v. Stuart*, 6 Wis. 2d 356, 364, 94 N.W.2d 630 (1959). “In a race-notice jurisdiction such as Wisconsin, prompt docketing of judgments is needed to establish the proper priority of claims.” *South Milwaukee Sav. Bank*, 234 Wis. 2d 733, ¶40. The statutory lien of a judgment creditor “is notice to the world when docketed.” *Hoesly v. Hogan*, 229 Wis. 600, 605, 282 N.W. 5 (1938). A creditor may have a valid judgment but, if not properly docketed, it does not become a lien. *See Builder’s Lumber Co.*, 6 Wis. 2d at 365.

¶15 Decade directs us to *Mann v. Bankruptcy Estate of Badger Lines, Inc. (Badger Lines)*, 224 Wis. 2d 646, 590 N.W.2d 270 (1999), for the proposition

⁴ Decade served Collier with the Order to Appear before the thirty-day time for perfection expired. *See* WIS. STAT. § 806.06(4).

that the first judgment creditor to serve a judgment debtor with an Order to Appear obtains the superior lien against the judgment debtor's assets. *See id.* at 649. The clear difference in *Badger Lines* is that the creditor claiming priority had a docketed judgment. *See id.* at 649-50. As the circuit court observed here, a properly docketed, or "executable" judgment was essential because "if the underpinning for the [supplemental] proceeding fails the proceeding itself necessarily fails."

¶16 Decade is correct that WIS. STAT. § 816.03(1)(b) offers an alternative to the more cumbersome execution procedure set forth in § 816.03(1)(a). It does not, however, present an alternative to a properly docketed judgment, without which there can be no creditor's lien. Without a creditor's lien, there is no right to pursue collection under § 816.03. This is in conformity with the generally accepted definition of "judgment creditor." *See, e.g.,* BLACK'S LAW DICTIONARY 861 (8th ed. 2004) ("[a] person having a legal right to enforce execution of a judgment for a specific sum of money").

¶17 Decade also contends the circuit court erroneously ruled that the equities favored SB1. A creditor's lien is an equitable creation. *See Badger Lines*, 224 Wis. 2d at 654 & n.3. "An appeal to equity requires a weighing of the factors or equities that affect the judgment—a function which requires the exercise of judicial discretion." *Mulder v. Mittelstadt*, 120 Wis. 2d 103, 115, 352 N.W.2d 223 (Ct. App. 1984). We review the circuit court's determination for an erroneous exercise of discretion. *Id.*

¶18 The circuit court noted that Decade could have checked whether its judgment had been properly docketed and that it has a remedy against the clerk. *See* WIS. STAT. § 806.10(3). Further, while the court did not expressly say so, the

record suggests that Collier evaded service from SB1 for months and that Decade's six lawsuits were filed as a dilatory tactic. We may search the record for reasons to sustain the circuit court's exercise of discretion. *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. We are satisfied that the court's exercise of discretion was proper.

¶19 Decade does not address the circuit court's denial of its motion for reconsideration as a separate argument. We conclude that there was no erroneous exercise of discretion in denying the motion, for the reasons stated above.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

